INDEX

	Page
The Opinions Below	1
Question Presented	2
Statement	2
A. The Nature and Chronology of the Case	2
B. The Allegations of the Complaint	3
C. The Decisions Below	5
1. The Trial Court	5
2. The Court of Appeals	6
Reasons for Denying the Writ	7
A. The Complaint on Its Face Seeks an Anti-Competitive Application of the Sherman Act	7
B. The Complaint on Its Face Repudiates an Actionable Claim of Attempted Monopoly Under the Antitrust Laws	10
C. There Is No Conflict of Decisions	14
D. The Motion To Dismiss Was Properly Sustained	16
Conclusion	18

CITATIONS

CASES:

American Tobacco v. *United States*, 328 U.S. 781, 785, 811, 815 (1946) 10

Brill v. *General Industrial Enterprises*, 234 F.2d 465 (3rd Cir. 1956) 17

Brown Shoe Co. v. *United States*, 370 U.S. 294, 320, 345 n. 72 (1962) 8, 9

Colpo v. *Highway Truck Drivers and Helpers*, 305 F.2d 362 (3rd Cir. 1962) 17

Dean Foods Co., [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,765 at pp. 23,102-03 (F.T.C. 1966) 9

Page

Elizabeth Hospital, Inc. v. *Richardson,* 269 F.2d 167, 169-70 (8th Cir. 1959), *cert. denied,* 361 U.S. 884 (1959) 16
Fink v. *Continental Foundry & Machine Company,* 240 F.2d 369 (7th Cir. 1957) *cert. denied,* 354 U.S. 938 (1957) 17
First National Bank of Arizona v. *Cities Service Co.,* 391 U.S. 253, 288, 290 (1968) 16, 17
International Salt Co. v. *United States,* 332 U.S. 392, 393 (1947) *aff'g* 6 F.R.D. 302, 304, 308 (S.D.N.Y. 1946) 16
Klor's v. *Broadway-Hale Stores,* 359 U.S. 207, 212, 213 (1959) 15
Lorain Journal Co. v. *United States,* 342 U.S. 143, 153 (1951) 10, 11
Mills v. *Green,* 159 U.S. 651 (1895) 17
Nelson Radio & Supply Co. v. *Motorola,* 200 F.2d 911 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953) .. 16
Northern Pacific Ry. Co. v. *United States,* 356 U.S. 1, 3-4, 6-7 (1958) 15, 16
Swift & Co. v. *United States,* 196 U.S. 375, 396 (1905) .10, 11
United States Steel Corp., 3 Trade Reg. Rep. ¶ 18,626 at p. 20,985 (F.T.C. 1968) 8
United States v. *Aluminum Company of America,* 148 F.2d 416, 431 (2d Cir. 1945) 14
United States v. *Columbia Steel Company,* 334 U.S. 495, 526 (1948) 8
United States v. *duPont & Co.,* 351 U.S. 377, 391 (1956) 10
United States v. *Grinnell Corp.,* 384 U.S. 563, 571 (1966) 10
United States v. *New York Great A. & P. Tea Co.,* 173 F.2d 79, 81, 82 (7th Cir. 1949) 15, 16
United States v. *Philadelphia National Bank,* 374 U.S. 321, 370 (1963) 8
United States v. *United States Steel Corp.,* 251 U.S. 417, 452 (1920) 12

OTHER AUTHORITIES:

Hearings, Select Committee on Small Business, United States Senate, Status and Future of Small Business, 90th Cong., 1st Sess. 714 (1967) 11
Kentucky Rev. Stat. (1960), §§ 260.675-260.760 13
Missouri Rev. Stat. (1959), §§ 416.410-416.560 13
Tenn. Code Annot. (1955), §§ 52-329 - 52-334 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 986

HILAND DAIRY, INC., REISS DAIRY, INC., and SUNNY HILL FARMS DAIRY COMPANY, INC., *Petitioners*

v.

THE KROGER CO., *Respondent*

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION

THE OPINIONS BELOW

The trial Court's Memorandum Opinion and Order appear at pages A. 1-7 of Petitioners' Appendix. The Opinion is reported at 274 F.Supp. 966. The Opinion of the Court of Appeals for the Eighth Circuit is included at pages A. 8-22 of Petitioners' Appendix. It is reported at 402 F.2d 968.

QUESTION PRESENTED

Whether a claim of attempted monopoly, prohibited by § 2 of the Sherman Act, is stated by a complaint to enjoin a retail grocer from entering the milk processing business by the internal construction of a dairy plant, to supply its own stores and other outlets, when the face of the complaint admits the following facts, among others:

(a) that the Respondent's retail grocery stores sell 8 per cent of the dairy products distributed at retail in the relevant market area defined in the complaint;

(b) that the dairy plant's total capacity approximates 20 per cent of present total demand in that area;

(c) that at least 70 dairies, including all of the largest national concerns, presently compete within the area; and

(d) that upon completion of the dairy plant, the Respondent will lack a sufficient market share to invest it with monopoly power to raise prices.

STATEMENT

A. The Nature and Chronology of the Case

Petitioners filed their complaint February 23, 1967, on their own behalf and on behalf of an alleged class including numerous dairies doing business in the "St. Louis, Missouri, Trade Territory", defined as "the geographical area within 250 miles, more or less, from St. Louis, Missouri" (R. 2)[1]—hereafter "the St. Louis

[1] The Record will be cited as "R."; the Petition as "Pet."; and the Appendix to the Petition as "A.".

Territory". The complaint alleged that because the Respondent—hereafter "Kroger"—operated retail grocery stores in that Territory, its internal expansion into dairy processing, by means of its own plant, was an unlawful attempt to monopolize trade in dairy products within the meaning of Section 2 of the Sherman Act. 15 U.S.C. § 2. No other violation of law was alleged. (R. 1-10).

On March 20, 1967, Kroger moved to dismiss the complaint for failure to state a claim on which relief could be granted. (R. 10-13). On September 11, 1967, the trial Court dismissed the complaint, noting Petitioners' failure to amend it or to request leave to do so. (R. 20-21). The Court of Appeals affirmed on October 31, 1968. (A. 22).

The complaint prayed only for a permanent injunction. (R. 8). No temporary restraining order or preliminary injunction was sought and the plant was completed before the case was heard in the Court of Appeals. (A. 14, n.4).

B. The Allegations of the Complaint

The material facts alleged in the complaint—admitted, *arguendo,* solely for purposes of the Motion to Dismiss—are as follows:

1. Petitioners are three dairies engaged in the processing and sale of fluid milk and other dairy products in the St. Louis Territory. (R. 1-2).

2. In addition to Petitioners, at least 67 other dairies are engaged in processing and selling fluid milk and other dairy products in the St. Louis Territory. Among them are National Dairy Products Corp., The Borden Co., Foremost Dairies and Beatrice Foods. (R. 1-2, 8-10).

3. Kroger is a retail grocery chain presently operating "more than 200 retail stores" in the St. Louis Territory. From these stores Kroger sells approximately 8 per cent of the fluid milk and other dairy products sold through retail outlets in the St. Louis Territory. (R. 2-4).

4. Although "existing processors have the capacity to and are effectively serving the needs of the territory" presently and "in the foreseeable future," Kroger has begun construction of a dairy processing plant. Upon completion it will have "sufficient capacity to supply more than 20 per cent of the total consumer demand for fluid milk and other dairy products in the" St. Louis Territory. Kroger undertook to build the plant with "the specific intent of supplying the full needs of all of [its] retail stores in the Territory" and of selling "dairy products to others at wholesale" in the Territory. (R. 4-5).

5. If completed, the plant will free Kroger from price restraints inherent in the purchase of dairy products from other processors "and from legislative limitations based upon resale markups or wholesale purchase prices." (R. 5).

6. Because it is engaged in the retail grocery business, Kroger will achieve "monopoly power" over dairy products, despite its inability "to increase its share of the milk and dairy products market to such a large percentage that it could then raise the prices of these products and subsequently reap a monopolist's benefit from the sales of these products at controlled high prices." (R. 5-6).

C. The Decisions Below

1. The Trial Court

The District Court's opinion summarized the market allegations of the complaint as follows (R. 15; 274 F. Supp. at 967):

> ". . . Kroger, with 200 retail stores, is presently constructing a facility by means of which it hopes to supply 20 per cent of the total demand for dairy products in this area including that satisfied in its own stores. Through its own retail outlets, Kroger is allegedly 'assured' of selling 8 per cent of the market and thereby of using 40 per cent of the plant's maximum production capacity. However, it will be compelled to compete with other processors, including the giants of the industry, for another 12 per cent of the market. The remaining 80 per cent of the market will not be affected, except indirectly."

The legal issue before the District Court was stated this way (R. 17; 274 F. Supp. at 968):

> "The basic question posed by the motion to dismiss is whether Section 2 of the Sherman Antitrust Act prohibits a large food retailer from continued internal expansion by constructing a plant in order to process one of the food products it sells (and for which it has a 'captive' market of 8 per cent), the plant having a capacity, in excess of the retailer's present needs, of an additional 12 per cent of the total market."

In dismissing the complaint, the Court held (R. 18, 19; 274 F. Supp. at 968, 969):

> "What plaintiffs are really saying, is that Section 2 of the Sherman Antitrust Act prohibits any large food retailer from manufacturing and processing any kind of merchandise it sells in quantity, at least if it intends to displace other processors which

have theretofore supplied its need for such merchandise. We have been cited to no comparable case which has ever so held or which has condemned internal expansion by a food retailer to provide for its own requirements.

* * *

"We hold that the mere construction of the processing plant by Kroger will not constitute a violation of Section 2 of the Sherman Antitrust Act."

2. The Court of Appeals

The Court of Appeals upheld the dismissal of the complaint as follows (A. 15, 18, 19, 22; 402 F.2d at 973, 975, 977):

"Accepting plaintiffs' premise that the Sherman Act prohibits any kind of act or practice that unduly restrains trade or monopolizes, we do not think any case has gone as far as the plaintiffs seek to journey in this one of protecting their market shares from competition of an internal expansion of Kroger into the St. Louis, Mo., Trade Territory; nor do we think the well-pleaded facts allege an attempt to monopolize in violation of § 2 of the Sherman Act.

* * *

"... Admittedly Kroger will not possess the power to raise milk prices. The power to lower milk prices by using milk as a 'loss leader' and recouping by higher prices on other items will not bear analysis as Kroger concededly has no monopoly in the retail grocery field. Its ability to raise prices above the market on other items appears speculative and is not warranted in view of the general competition in the market place. Also in the wholesale market for milk and dairy products its position is inferior to the combined shares of 67 other processors (including some of the giants of the industry, such as National Dairy

Products, Foremost, Borden), possessing ample capacity to supply the entire market. Plaintiffs admit in their brief that 'Kroger will be a newcomer in milk processing, have a relatively small share of the market, and will face competition from already established competitors, some of whom are national giants in the milk business'."

* * *

". . . A mere allegation of an attempt to monopolize is a conclusion of law and about all anyone could say is that Kroger would have the power potentially to engage in some unfair and predatory practices in this field, but there is no showing of unfair or predatory practices. And any future operations are subject to the proscription of federal and state laws that condemn monopolies and unfair and predatory trade practices that unduly restrict competition.

* * *

". . . Plaintiffs' market shares are not protected by the antitrust laws and they have no legal basis for precluding competition of Kroger in their field. This is all the District Court held and, of course, is the narrow holding of our affirmance upon appeal. Plaintiffs are not foreclosed by this decision in protecting themselves against any unfair trade practice or predatory acts that are unreasonably restrictive of competition in violation of the antitrust and other laws."

REASONS FOR DENYING THE WRIT

A. The Complaint on Its Face Seeks an Anti-Competitive Application of the Sherman Act

As the Court of Appeals readily perceived, the ultimate vice of Petitioners' complaint is the inherent attempt to preserve their existing market shares by using the antitrust laws as insulation against lawful competition. (A. 22; 402 F.2d at 977). The irony is com-

pounded by the target of the complaint—unilateral growth by the favored method of "internal expansion." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370 (1963).

The complaint perverts the principles underlying the antitrust laws in every significant aspect. First, it opposes the Congressional prerogative to regulate the national economy. Petitioners would have the Court override the legislative decision embodied in Section 7 of the Clayton Act. They demand an adjudication which

> "ignores the distinction made by Congress between market entry through internal expansion and that achieved through acquisition."[2]

The short answer is found in *United States* v. *Columbia Steel Company*, 334 U.S. 495, 526 (1948):

> "If businesses are to be forbidden from entering different stages of production that order must come from Congress, not the Courts."

Next, the complaint conflicts with the antitrust policy of encouraging competitive expansion of the national industrial structure. Petitioners invite the Court to frustrate the internal growth process by which industry can "provide increased investment in plants, more jobs and greater output." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 345 n. 72 (1962).

Third, the complaint defies the antitrust policy of insuring consumers the advantage of competitively determined prices. The Court is requested to underwrite

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[2] *United States Steel Corp.*, 3 Trade Reg. Rep. ¶ 18,626 at p. 20,985 (F.T.C. 1968).

higher milk prices, at the public's expense, by excluding a more efficient distributor from the marketplace. The paradox of such a plea, in the name of antitrust enforcement, is exposed by the Federal Trade Commission's § 7 decision in *Dean Foods Co.*, [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,765 (F.T.C. 1966).

In that case, Dean had acquired Bowman Dairy to offset a loss of business threatened by the internal expansion of a major chain store customer—Jewel Tea Co.— into dairy processing. The Commission rejected, as follows, an attempted justification of the merger grounded on its defensive character (*id.* at pp. 23, 102-03):

> "Respondent and the hearing examiner seem to us to have confused the effects of competition with competitive vitality and *to be suggesting that Section 7 was designed to protect market shares from the effects of competition* . . . . But as has been reiterated so often, the antitrust laws are not designed to protect competitors, but only competition. *Brown Shoe Co.* v. *United States* 370 U.S. 294, 320 (1962).[3]
>
> * * *
>
> "[T]he Bowman acquisition represented a completely noncompetitive response to the competitive problem posed to [Dean] by Jewel's contemplation of furnishing its own milk supplies . . . *The main point here is that Dean turned the entry of Jewel which could have resulted in a downward pressure on prices in the Chicago market, into a price stabilization move by its acquisition of Bowman* . . . ."

[3] Emphasis supplied throughout unless otherwise indicated.

B. The Complaint on Its Face Repudiates an Actionable Claim of Attempted Monopoly Under the Antitrust Laws

The facts pleaded in the complaint repel an actionable claim of attempted monopoly under the governing principles delineated by this Court. The basic test is the presence of a "dangerous probability" that, if not checked, the challenged conduct will achieve monopoly. *E.g., Swift & Co.* v. *United States,* 196 U.S. 375, 396 (1905); *American Tobacco* v. *United States,* 328 U.S. 781, 785, 815 (1946); *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 153 (1951). This was reflected by the jury instructions quoted and approved in *American Tobacco, supra,* 328 U.S. at 785, 815:

> "'The phrase "attempt to monopolize" means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, *though falling short, nevertheless approach so close as to create a dangerous probability of it,* . . . .
>
> "'It is in no respect a violation of the law that a number of individuals or corporations, each acting for himself or itself, may own or control a large part, or even all of a particular commodity, or all the business of a particular commodity.'
>
> * * *
>
> "Accordingly, the instructions of the trial court under § 2 of the Act are approved."

By this Court's definition, the hallmark of monopoly is "that power exists to raise prices or to exclude competition when it is desired to do so." *American Tobacco, supra,* at 811; *United States* v. *duPont & Co.,* 351 U.S. 377, 391 (1956); *United States* v. *Grinnell Corp.,* 384 U.S. 563, 571 (1966). As the Court of Ap-

peals noted, the applicable precedents disclose that a finding of monopoly presupposes proof of an overwhelming market share. (A. 16-17; 402 F.2d at 974),[4]

Under these standards, the complaint negates any actionable claim of attempted monopoly. The complaint alleges that Kroger will face numerous dairy competitors, including the largest national concerns (R. 2, 8-10; A. 18); can potentially supply 20% of the market (R. 4; Pet. 15); and cannot

> "increase its share of the milk and dairy products market to such a large percentage that it could then raise the prices of these products and subsequently reap a monopolist's benefit from the sales of these products at controlled high prices." (R. 6).

In view of these admissions, the professions of Kroger's wrongful intent are immaterial. An unlawful attempt to monopolize contemplates a showing that both "intent and the consequent dangerous probability exist." *Swift & Co.* v. *United States, supra,* 196 U.S. at 396. *Accord*: *Lorain Journal Co.* v. *United States, supra,* 342 U.S. at 153. Since Kroger admittedly will lack sufficient market participation to enable it to raise prices, the complaint belies any possibility—let alone "dangerous probability"—of monopolization. It fol-

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[4] In summing up the authorities on this issue, former Assistant Attorney General Turner, head of the Antitrust Division, testified before a Congressional Committee:

> "Also, Section 2 refers to monopolies but not to oligopolies, and it has never been found to cover a monopoly in an industry in which the leading firm accounts for less than 70 per cent of the market." *Hearings, Select Committee on Small Business, United States Senate, Status and Future of Small Business,* 90th Cong., 1st Sess. 714 (1967).

lows that the complaint is not saved by the assertions of wrongful intent, even assuming, *arguendo,* that this is properly alleged by subjective predictions of Kroger's future conduct.[5] Petitioners' difficulty is that on the facts pleaded, "whatever there was of wrongful intent could not be executed." *United States* v. *United States Steel Corp.,* 251 U.S. 417, 452 (1920).

The complaint is also belied by the supplemental material first introduced in this Court as appendices to the Petition. This rebuts the allegation that Kroger would preempt the milk and dairy products market represented by its stores. The complaint predicted that Kroger

> "intends . . . to supply the full needs of its retail stores . . . from which 8% of the milk and other dairy products are sold at retail in the St. Louis Trade Territory." (R. 5).

But, according to Petitioners' supplemental affidavit of January 10, 1969, Kroger's Missouri stores are also selling milk produced by a "national independent dairy" and "a local independent dairy". (A. 49).

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[5] As both lower Courts correctly held, the "intent necessary to support an attempted monopolization under § 2 must be shown by conduct or acts from which a wrongful intent can be inferred." (A. 19, 402 F. 2d at 975; R. 19, 274 F. Supp. at 969). Petitioners' complaint is barren of such a showing. In the trial Court's words (R. 19; 274 F. Supp. at 969):

> "Here, the sole actions of Kroger, as set forth in the complaint, are (1) the operation in this trade area of 200 retail food stores, and (2) the construction of a dairy processing plant to supply its own needs (with an excess capacity with which it will compete for a portion of the remaining market)."

This betrays the emptiness of the charge of monopoly as to Kroger's own retail outlets.[6]

Nor can the Section 2 charge of attempted monopoly be sustained by the allegation that Kroger would use dairy products as "loss leaders". (R. 5). Even if this were true, below cost sales would not increase the 20% market share attainable by Kroger's dairy. But again, the allegation is questionable. Missouri legislation—regulating "Unfair Milk Sales Practices"—expressly prohibits sales of dairy products below cost "at retail", including sales at retail by "processors".[7] This undermines Petitioners' use of the belated affidavit to imply that Kroger was "loss leadering" by offering its private label milk at 48¢. (A. 49; Pet. 18).

Petitioners' price argument demonstrates that "loss leadering" is not their real concern. If it were, they

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[6] Although accepting the allegation for purposes of the Motion, the trial Court suspected that Kroger stores would sell outside milk (R. 18, n. 1):

> "We seriously question whether the 8% of the market represented by sales of fluid milk and dairy products to Kroger customers is truly a 'captive' one. In this day and age, in which ultimate consumers are brand-name conscious, it does not necessarily follow that all Kroger customers who (for example) purchase Sealtest brand milk or ice cream will accept similar Kroger brand products, even at a reduced price. The situation is wholly unlike that of a steel manufacturer attempting to gain control of steel fabricators, in which event the market for the steel to be fabricated would be a 'captive' one."

[7] *Missouri Rev. Stat.* (1959) §§ 416.410-416.560, specifically § 416.415. Below cost sales of milk products at retail are also prohibited in Tennessee and Kentucky. *Tenn. Code Annot.* (1955) §§ 52-329-52-334; *Kentucky Rev. Stat.* (1960) §§ 260.675-260.760.

would be seeking relief under precisely tailored local legislation, not an attempted monopoly claim. Petitioners' object, rather, is to entice a judicial application of the Sherman Act to subsidize their operations against more efficient competitors. Particularly in this age of persistent increases in the consumer price index, the Sherman Act should be used to guard consumers against price exploitation, not to expose them to it.

C. There Is No Conflict of Decisions

The complaint is addressed solely to Kroger's unilateral action in building its own facility to process dairy products which it will offer for sale in an intensely competitive market. There is no charge of conspiracy or concert with anyone else. There is no claim that Kroger will condition the sale of any dairy products upon the purchase of other merchandise.

Only one antitrust decision—in a totally different monopoly context—has ever criticized internal expansion. *United States* v. *Aluminum Company of America,* 148 F.2d 416 (2d Cir. 1945). It has no bearing here. The following recital in the *Aluminum Company* opinion discloses the difference:

> "Nothing compelled it to keep doubling and redoubling its capacity *before others entered the field.*" 148 F.2d at 431.

The trial Court here aptly noted the distinction. (A. 5; 274 F. Supp. at 968):

> "There, defendant, the giant of the industry, continually anticipated increased demand by doubling and redoubling its capacity, thereby successfully deterring others from entering the market. Here,

some 70 dairy processors now have 100 percent of the market."[8]

Nor is a conflict indicated by any of the other authorities cited in the Petition. Each involved "concert" —*i.e.*, conspiracies, mergers or tie-in agreements—not unilateral action. This is readily apparent from the three purported conflict cases quoted in the Petition (Pet. 10, 11, 13). The complaint in *Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207, 212, 213 (1959) charged a group boycott, described as "a wide combination consisting of manufacturers, distributors and a retailer." *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1, 3 (1958), dealt with bilateral tying agreements—known as "preferential routing clauses"—requiring shippers who had purchased or leased land from the defendant railroad to favor it with their traffic.[9] The issue in *United States* v. *New York Great A. & P. Tea Co.,* 173 F.2d 79, 81, 82 (7th Cir. 1949) involved a conspiracy among A & P, its subsidiaries

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[8] Petitioners' complaint acknowledges that "existing processors have the capacity to and are efficiently serving the needs of the territory and are capable of serving the needs of the territory in the foreseeable future." (R. 4-5).

[9] The Court further noted that a grocery retailer operating in a competitive market would lack the market power to restrain trade by a tying arrangement (356 U.S. at 6-7):

> "Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

and various individuals. In the Court's words (*id.* at 82):

> "The issue is whether there is substantial evidence to show a conspiracy by the defendants to restrain and monopolize trade in commerce in food and food products by controlling the terms and conditions upon which the defendants and their competitors might do business and by oppressing competitors through the abuse of the defendants' mass buying and selling power. . . ."

D. The Motion To Dismiss Was Properly Sustained

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes motions to dismiss complaints for "failure to state a claim on which relief can be granted." The rule does not exclude antitrust claims. See, *e.g.*, *Nelson Radio & Supply Co.* v. *Motorola,* 200 F.2d 911 (5th Cir. 1952), *cert. denied* 345 U.S. 925 (1953); *Elizabeth Hospital, Inc.* v. *Richardson,* 269 F.2d 167, 169-70 (8th Cir. 1959), *cert. denied* 361 U.S. 884 (1959). As the Court of Appeals recognized—quoting *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253, 288, 290 (1968)[10]—there is no rule of thumb foreclosing summary disposition of antitrust claims in appropriate cases. See also *Northern Pacific Railway Co.* v. *United States, supra,* 356 U.S. 1, 4; *International Salt Co.* v. *United States,* 332 U.S. 392, 393 (1947).[11]

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[10] A. 13-14.

[11] In *International Salt,* the summary judgment was entered without affidavits, on the basis of facts admitted by the pleadings and the motion papers. See *United States* v. *International Salt Co.,* 6 F.R.D. 302, 304, 308 (S.D.N.Y. 1946).

If Petitioners' complaint states no claim, further proceedings would be an exercise in futility. In *Bank of Arizona, supra,* 391 U.S. at 290, this Court refused to hold

> "that anyone who files an anti-trust complaint setting forth a valid cause of action [is] entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

The Petition would have the Court go further. It claims that despite Petitioners' failure to state "a valid cause of action", they are nevertheless "entitled to a full-dress trial". Acceptance of the claim would expose the courts to a deluge of litigation. A "full-dress trial" would be required of every complaint subjectively ascribing a monopolistic intent to a competitor's plan to expand its facilities.[12]

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[12] Although the complaint challenged Kroger's right "to complete the construction of a processing plant" (R. 6), no interim relief was sought and the plant was in fact completed pending appeal to the Court below. (A. 14, n. 4). So far as construction of the plant was in issue, the case may therefore be moot. *Compare Mills* v. *Green,* 159 U.S. 651 (1895); *Fink* v. *Continental Foundry & Machine Company,* 240 F. 2d 369 (7th Cir. 1957), *cert. denied,* 354 U.S. 938 (1957); *Colpo* v. *Highway Truck Drivers and Helpers,* 305 F. 2d 362 (3rd Cir. 1962); *Brill* v. *General Industrial Enterprises,* 234 F. 2d 465 (3rd Cir. 1956).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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